

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
PETITION FOR  
REHEARING  
EN BANC**





76-1589

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA, :

Appellee, :

v. :

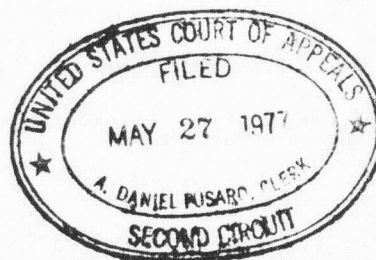
MANUEL ALFONSO RODRIGUEZ, :

Defendant-Appellant. :

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PQS

PETITION FOR REHEARING,  
~~MOTION FOR STAY OF MAN-~~  
~~DATE,~~ AND SUGGESTION FOR  
A HEARING OF THE APPEAL  
EN BANC



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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

- - - - -X

UNITED STATES OF AMERICA, :  
Appellee, :  
v. :  
MANUEL ALFONSO RODRIGUEZ, :  
Defendant-Appellant. :

- - - - -X

To: The Honorable Judges of the Panel:  
Hon. Oakes, Circuit Judge  
Hon. Holden, District Judge  
Hon. Wyzanski, District Judge

The petitioner, Manuel Alfonso Rodriguez, by Charles  
Sutton, his attorney, respectfully shows:

point I

The appellant was charged  
and convicted upon false  
evidence in violation of  
his constitutional rights.

This Court by its decision dated May 11, 1977 has  
affirmed the conviction of the appellant Rodriguez upon the  
basis that

"The record makes it plain to us that, despite the  
canards of appellant's counsel, at every stage of

the case the Government took the position that it did not claim that defendant Rodriguez had personally signed the certificate in Count 3. Thus the sharpest distinction is drawn in Count 1 between the certificate 'bearing the signature of .... Rodriguez' (Emphasis by Court) and the Form DSP-83 'Consignee Purchaser Transaction Statement signed by .... Rodriguez', (Emphasis by Court) and the purchase order 'signed by Howard Peters'. That distinction was obviously maintained in the text of Count 3 of the indictment as well as in the various oral statements of Government counsel to the District Court and the defense counsel. No reasonable person could doubt that the prosecution's consistent position was that Rodriguez' name on the certificate was there with his full knowledge and authorization, but not as a result of his penmanship. This was the nub of the difference between the certificate 'bearing the signature' (Emphasis of words in quotes by the Court) of Rodriguez, and the Form DSP-83 'signed' (Emphasis of word in quotes by the Court) by him." (Underscoring added other than as stated).

It is respectfully submitted that this Court has overlooked the record fact that at no time did the Government state or disclose to the trial court or to either of the defense trial counsel that the language in the indictment under Count 1 and Count 3 "bearing the signature of" had any signification which was different from words "signed by". At no time did the Government state or disclose to the trial court or to either of the two defense trial counsel in the case that those two sets of words were not of the same meaning and of the same fact.

The record is totally barren of any notice or information from the Government to the trial court or to either of the defense trial counsel that the words in the indictment



"bearing the signature of" Rodriguez, had the unstated meaning in and under the indictment that the Government was

"not going to claim that Colonel Rodriguez himself wrote that signature on that piece of paper. On the other hand, we are very definitely claiming that signature appears on that paper with the full authorization and knowledge of Colonel Rodriguez... we are not going to claim that he signed it. .... We are not going to introduce any evidence that he physically signed it. ..." (T255-257). (Underscoring added).

The record fact is that the Government did indeed claim to the jury that the appellant Rodriguez signed the "certificate" at issue (GX 31, as well as GX 11, 15 and 19). The trial transcript shows that at the very incident when the Government prosecutor so declared as above to the trial court and defense trial counsel, that he also declared that

"There has been testimony already. Mr. Geraldo said Mr. Rodriguez signed it. Mr. Geraldo said that at the meeting, and that is not what I am saying." (T 257). (Underscoring supplied).

The Government prosecutor had played to the jury a tape recording wherein Miguel Celis had told Geraldo, Agent Kelly, and others, that the three blank sheets of paper that he had produced on May 2, 1976 had been signed by appellant Rodriguez (Appendix, pp. 85 SA)

"Celis: Well, I have some blanks and I have three, these signed..."

Cagianese: Three signed and some blanks, good.

.....

Celis: Ah, this man who signed it, Colonel Rodriguez, he is the first director of this corporation..." (Appendix, pp. 85 SA) (Underscoring added).

The Government prosecutor explicitly stated to the jury in his opening statement with regard to that very tape recorded evidence in which Miguel Celis stated that Colonel Rodriguez "signed" three blank sheets of paper bearing the letterhead Estado Mayor General de La of the Fuerza Armada of the Republic of El Salvador:

(T 16) "On May 2, Mr. Geraldo returned to the United States. He attended a meeting at which were present Mr. Michaelson as well as Jo Jo (the Government Agent Kelly), Mr. Cagianese and Mr. Michaelson brought with him to that meeting two men from El Salvador, one the defendant Miguel Celis, the business associate of Colonel Rodriguez, and the other man named Suarez, who plays no further role in this case. (T 17). These two men brought with them a blank piece of paper on the letterhead of Colonel Rodriguez, bearing the signature of Colonel Manuel Rodriguez. The whole letter was blank in between the letterhead and the signature.

Mr. Geraldo (sic) and Mr. Celis explained that it had been done that way so that the people here who were familiar with what the State Department needed could fill in the language that would provide the end use certificate. That was done. The document was actually prepared. ..." (T 17). (Matter in parenthesis and underscoring added).

The Government prosecutor emphasized to the jury that the so-called end use certificate (GX 31) was

"under Colonel Rodriguez' signature" (T 17) ....

"That Colonel Rodriguez wanted \$75,000 for providing that certificate (T 17) ...";



" .... Colonel Rodriguez is running a big risk, signing a document like that ... (T 18);

".... That Colonel Rodriguez in fact has provided this certificate (T 19)....";

"On May 5, the documents are sent to the State Department. ... They include this document that was prepared by Mr. Geraldo in Mr. Michaelson's office, signed by Colonel Rodriguez, which states that El Salvador wants these 10,000 submachine guns for its national defense. ... Those three documents are in fact filed with the State Department." (T 19).

"... getting a false end use certificate from a high official of a foreign country..." (T 25). (Under-scoring added).

In his opening statement, the Government prosecutor declared that the "high government official" was "Colonel Rodriguez" (T 16).

The Government prosecutor deliberately elicited testimony from his witness Agent Kelly that Colonel Rodriguez had "signed" the so-called end use certificate by his hearsay testimony that Miguel Celis had told him (Agent Kelly) on May 2, 1976 that the papers, one of which became GX 31, the certificate,

".... was signed with a signature. (T 253) .... that Colonel Rodriguez had signed the document ...." (T 254). (Under-scoring added).

The Government prosecutor elicited the statement from the translator in translating the certificate (GX 15) which was one form of the final end-use certificate and one of the three blank letterheads which Agent Kelly and the tapes

had testified had been signed by Colonel Rodriguez, as stated by Miguel Celis (Appendix 85 SA ) and by Agent Kelly relating hearsay (T 271-272)

"Mr. Hoffman: It has an official letterhead ....  
Signed by Manuel Alfonso Rodriguez  
...." (T 271-272). (Underscoring added).

The Government prosecutor elicited testimony from Agent Kelly that

"... I told Mr. Cagianese that Colonel Rodriguez was to come to New York on May 15 and at that time we were going to pay him \$75,000 for his furnishing us with the end use certificate ... (T 298-299). Miguel Celis handed - showed us three copies of it - three original copies of the blank form signed by, according to him, Colonel Rodriguez (T 484) ....

The Court: whether Colonel Rodriguez had signed the document. Did you know?

The Witness (Kelly): I was told he had signed it... (T 486)

.....

A. Mr. Michaelson told us that the Colonel had signed the certificate for us ... (T 571)."  
(Underscoring added).

The Government prosecutor in fact intentionally questioned Agent Kelly so as to discount the cross-examination question of defense trial counsel whether Agent Kelly "had heard that Colonel Rodriguez did not sign this document that has been described as the end use certificate, and you answered Yes ...." so as to place that information not as coming from Miguel Celis, wherein he had confessed that he had traced the



"signature" of Colonel Rodriguez when Celis was in the United States, after May 1, 1976, and elicited the false, deliberately misleading answer which caused the trial court to state:

"The Court: Well, no he heard it after the arrest which would be appropriate. Is that correct?

The Witness: That is also (sic) correct Your Honor" (T 584-585). (Matter in parenthesis and underscoring added).

The Government Prosecutor later again took especial effort to assert to the trial court that Agent Kelly's "information" that Colonel Rodriguez had not signed the end use certificate had come from Colonel Rodriguez, when after his arrest, he denied the "signature" on the end use certificate was his (Rodriguez) (T 623-626. The Government prosecutor had previously so stated:

"Mr. Fiske: It seems to me the fair way to straighten this out now is to let me put it back to Kelly that when he said - because this is the only way we can correct the record fairly at this time - is when he said he heard that Colonel Rodriguez had not signed the end use certificate, he heard that that is what the Colonel himself said. I think that puts it right in the context ...." (T 588-589). (Underscoring added).

The Government prosecutor repeated that misinformation again at T 627, and again at T 630-631; and again at T 719, at the end of the trial, to wit:

".... It seems to me, Your Honor is entitled to take his denial with respect to his signature in the context of other false exculpatory statements that are contained in that document." (Referring to Rodriguez' alleged post-arrest statement) (T 719).

The Government prosecutor deliberately concealed the essential facts that Miguel Celis had confessed on and prior to May 26, 1976 that he (Miguel Celis) had traced the "signature" of Colonel Rodriguez on the end use certificates in all their forms (GX 31, 19, 15 and 11).

The Government prosecutor tied together the signing by Colonel Rodriguez of the end use certificate (GX 31, 19, 15 and 11) and the Form DSP-83 (T 587) as being done the same way by Colonel Rodriguez:

"Mr. Fiske: What happened, Your Honor, was Agent Kelly said that -- he was talking about the DSP-83, that Colonel Rodriguez -- he assumed Colonel Rodriguez had signed the DSP-83 at the meeting and Mr. Hallinan said, did you also assume that he signed the end use certificate and Agent Kelly said Yes..." (T 587). (Underscoring added).

The Government prosecutor used the words "his signature" and "the signature" in describing the signature on the DSP-83 (T 715). He made no distinction between "signed by" and "bearing the signature of" Colonel Rodriguez, to wit:

"His signature appears on a document that has a seal over his signature ..." (T 715).



The Government prosecutor used the same words, "signed" by Colonel Rodriguez in describing the certificate (GX 31 and GX 19, 15 and 11) (T 587) and in describing the Form DSP-83 (T 587).

The Government prosecutor elicited testimony from Government Witness Timothy M. Gomez that the "signature" on the end use certificate was signed by Colonel Rodriguez (T 608):

"Q. Was there a signature line on that end use certificate?

A. Yes.

Q. .... Was there a signature on the document?

A. Yes.

Q. Was there a description of who the signatory was?

A. Yes.

Q. Do you recall what that description said?

A. Well, I believe it was the Colonel -- I don't remember his full name -- but a Colonel Rodriguez and I think it had his title there..." (T 608). (Underscoring added).

At the end of the trial, in the robing room conference prior to summations, the Government prosecutor specifically described the end use certificate in Count 3 of the indictment and declared to the trial court that

"Colonel Rodriguez had signed it - had agreed to provide the end use certificate and that he had signed a document in blank which was to be filled in with the necessary information. Colonel Rodriguez, in his post arrest statement, denied that he had signed that document". (T 715-716). (Underscoring added).

The Government prosecutor argued to the trial court that a comparison of the signatures on the end use certificate and on the DSP-83 showed "a remarkable similarity of the signatures" so that the conclusion would be that Colonel Rodriguez signed both the end use certificate and the DSP-83 (T 716):

"I submit, Your Honor, if you would look at the specific exhibits, the DSP-83 and the end use certificate, and the other document that was signed in blank (See, T 257), there is a remarkable similarity of signatures" (T 716). (Matter in parenthesis added).

The Government prosecutor directly declared thereby that the GX 11 (T 257) was signed by Colonel Rodriguez, which at T 257, the Government prosecutor asserted he was not going to claim that Colonel Rodriguez signed that exhibit (GX 11), while at the same time (T 255-257) the Government prosecutor was there stating that his witnesses would testify that Colonel Rodriguez signed the end use certificate (T 255-257).

The Government prosecutor declared to the trial court that

"As to Count 3, Your Honor, ... there the document that is the subject is a document with which Colonel Rodriguez himself is directly linked". (T 717-718). (Underscoring added).

It must be carefully kept in mind that the only evidence from any witness, hearsay or admissible, was that Colonel Rodriguez signed the end use certificate.



The trial court denied the defense motion to dismiss Count 3 on the reasoning that

"... there is, to my mind, sufficient amount of evidence from which the jury may infer knowledge of the making of the certificate which is the subject matter of Count 3..." (T 724). (Underscoring added).

This statement by the trial court must be read in the context of the trial evidence that the Government presented that Colonel Rodriguez had signed a blank letterhead paper, which was filled up later, as the end use certificate, and which was then filed with the State Department. The only "connection" between Colonel Rodriguez and the end use certificate was the hearsay testimony of government witnesses that Colonel Rodriguez had signed the end use certificate. There was no evidence that Colonel Rodriguez had "authorized" Miguel Celis to "sign" Colonel Rodriguez' "signature" to that end use certificate, and there was no evidence that Miguel Celis had "signed" Colonel Rodriguez' "signature", much less that he did so by tracing the "signature" of Colonel Rodriguez thereon.

In his closing arguments to the jury, the Government prosecutor asserted that

"Colonel Rodriguez is the man who Mr. Geraldo contacted in El Salvador who agreed to provide the documentation for \$75,000 in cash ..." (T 742).

that

"On May 2nd .... at a meeting .... you heard Agent

Kelly testify that he told Agent Kelly and others that he had obtained Colonel Rodriguez, Chief of Staff of the Armed Forces of El Salvador, who had agreed to provide the end use certificate..." (T 748).

The Government Prosecutor thus reminded the jurors of the testimony of Agent Kelly.

The Government offered proposed Charge number 29 to the trial court which appears at page 6 of appellant's brief, which the trial court modified by adding the words "which purported to be that of" so that the charge read as rendered was as follows:

"With respect to Count 3, the statement that the government contends was false was Government's Exhibit 31, end use certificate, typed in Spanish, and bearing a signature which purported to be that of Manuel Alfonso Rodriguez." (T 894).

The jury was thus directly presented with the question whether the "signature" on the end use certificate was that of Colonel Rodriguez, in the sense that Colonel Rodriguez signed the end use certificate. It had no other meaning. There was no evidence whatever that Miguel Celis had "placed" the Colonel's "signature" on it and there was no issue whatever which was presented to the jury to decide whether Colonel Rodriguez had authorized Celis to "place" Rodriguez' "signature" on it, or whether Colonel Rodriguez "knew" that Celis had "placed" Colonel Rodriguez' "signature" on the end use certificate.



The Government totally concealed from the jury, from the trial court and from the defense counsel the vitally important facts that Miguel Celis had forged Colonel Rodriguez' "signature" on the end use certificate by tracing the Colonel's "signature" on blank sheets of letterhead paper of the Estado Mayor de la Fuerza Armada of El Salvador.

The only issue that the jury decided was the genuineness of the signature of Colonel Rodriguez, that he had actually physically signed the end use certificate, which issue was raised to the jury by Defendant's Exhibit 1, the so-called post arrest statement in which the Colonel is alleged to have denied that the "signature" on the end use certificate was his. (See, T 298-299; 584-585; 588-589; 623-626; 627; 630-631; 719).

The Government's argument on the appeal as to what it would "claim" is irrelevant. The Government in fact charged and tried and convicted the appellant Rodriguez before the jury on the false evidence that appellant Rodriguez had signed the end use certificate.

The Government prosecutor never informed the Court, or trial counsel, or the jury that Miguel Celis had traced, had forged, the "signature" of Colonel Rodriguez on to the end use certificate when Celis came to the United States on May 2, 1976.

There was not a scintilla of evidence that Miguel

Celis had "placed" the "signature" of Colonel Rodriguez on the end use certificate. There was absolutely no evidence that Miguel Celis perpetrated that forgery "with the knowledge, or consent, or authorization of Colonel Rodriguez". It is undisputable that the Government cannot point to any place in the trial transcript to show that the Government presented any evidence -- hearsay or admissible -- to the jury that Miguel Celis "placed" Colonel Rodriguez' "signature" on the end use certificate, much less that he "placed" it there with the knowledge, consent, or authorization of Colonel Rodriguez.

#### Point II

The Government knowingly  
used false evidence and  
false testimony to charge  
and to obtain the conviction  
of appellant Rodriguez.

It is an undisputed fact that appellant Rodriguez did not sign the end use certificate and that it does not bear his signature. (See also Appellant's Br., point VII). Unless the forgery of a "signature" in law constitutes a valid "signature" of the forger, and of course it does not, then this forgery by Miguel Celis does not constitute it as the "signature" of Colonel Rodriguez so as to bind him thereto.

The Government, knowing the truth, presented false



evidence in violation of the rule set down in the cases cited by appellant in his brief at pp. 9-10.

point III

The Government violated  
the rule of Brady v.  
Maryland.

The Government has not answered and cannot answer the fact that Brady v. Maryland, 373 U.S. 83 (1963) is applicable and that it failed to disclose the vital facts that Miguel Celis had traced the "signature" of Colonel Rodriguez on May 2, 1976 in the United States on the alleged letterhead of the Estado Mayor General de la Fuerza Armada of El Salvador, as stated in point III of appellant's brief.

point IV

The appellant was  
denied the effective  
assistance of  
counsel.

The appellant respectfully urges the court to reconsider the points raised by him concerning the ineffective assistance of counsel.

point v

The appellant requests that the mandate of this Court be stayed pending this application for rehearing.

The appellant respectfully requests that the mandate of this Court be stayed pending the determination by this Court of his application for a rehearing, in the interests of justice. The Government cannot be prejudiced thereby since the appellant continues to be confined to jail, as he has been since May 15, 1976.

point VI

The appellant respectfully suggests that this appeal be heard en banc.

In view of the serious constitutional issues presented on this appeal, the appellant respectfully suggests that the appeal should be heard en banc.

conclusion

The applications made herein should be granted.



Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Charles Sutton", is written over a horizontal line.

Charles Sutton  
Attorney for appellant Rodriguez  
299 Broadway  
New York, New York 10007  
212-964-8612

Dated: As of May 24, 1977

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Nos. 1013, 1014—September Term, 1976.

(Argued April 4, 1977                      Decided May 11, 1977.)

Docket Nos. 76-1589, 76-1590, 76-1591

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UNITED STATES OF AMERICA,

*Appellee,*

v.

MANUEL ALFONSO RODRIGUEZ, and RAYMOND GERALDO,

*Defendants-Appellants.*

---

Before :

OAKES, *Circuit Judge,*  
HOLDEN, *District Judge,\**  
and WYZANSKI, *Senior District Judge.\*\**

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Appeal from Judgment of the United States District Court for the Southern District of New York, Kevin Thomas Duffy, *Judge* on the grounds that the indictment was legally insufficient, the prosecutor had misconducted himself, the verdicts were based upon insufficient and improperly admitted evidence, the District Judge's instructions were improper, and defendant's trial attorney failed to give effective assistance of counsel.

Affirmed.

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\* Chief District Judge for the District of Vermont.

\*\* Senior District Judge for the District of Massachusetts, sitting by designation.



ROBERT B. FISKE, JR., United States Attorney for the Southern District of New York, Attorney for the United States of America and JAMES A. MOSS, LAWRENCE B. PEDOWITZ, and FREDERICK T. DAVIS, Assistant United States Attorneys, of Counsel, *for Appellee.*

CHARLES SUTTON, Attorney for Appellant Rodriguez, and GORDON J. LANG, Attorney for Defendant Geraldo, *for Defendants-Appellants.*

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WYZANSKI, *Senior District Judge:*

Rodriguez and Geraldo appeal from judgments of conviction based on (1) Count 1 of an indictment charging them and others with violation of 18 U.S.C. § 371 by a conspiracy to file false documents with the United States Department of State and to violate the Gun Control Act of 1968, 26 U.S.C. §§ 5811, 5812, and 5861 (d) and (e), and (2) Count 3 of the same indictment charging them and others with violation of 18 U.S.C. §§ 1001 and 2 by having made false representations in matters within the jurisdiction of the United States Department of State. Geraldo also appeals from judgments of conviction on Counts 2 and 4 which involve the same statutory sections as does Count 3.

Each defendant claims that (1) the indictment was legally insufficient, (2) the prosecutor misconducted himself, (3) the jury's verdicts were based upon insufficient and improperly admitted evidence, and (4) the District Judge's instructions were improper. Additionally, Rodriguez alleges that because of the incompetence of his trial attorney he was denied the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution.

None of those claims is sound.

Count 1 of the indictment charged that appellants and others from January 1 to May 15, 1976 conspired to violate Title II of the Gun Control Act of 1968, 26 U.S.C. §§ 5811, 5812, 5861 (d) and (e) and 18 U.S.C. §§ 1001 and 2, which relate to false statements made to and within the jurisdiction of federal governmental agencies. It alleged that the object of the conspiracy was secretly to sell weapons and ammunition to buyers in the United States in a manner intended to conceal from the Departments of State and Treasury the true identities of the buyers; that to attain their object the conspirators agreed to prepare and file with the State Department fraudulent documents to create the false appearance that certain weapons and ammunition were to be purchased by foreign countries for their exclusive use; that among the means defendants used were (a) "defendants prepared, facilitated the preparation of, and caused to be prepared certain false and fraudulent documents including: (i) an official . . . 'Application/License' . . . (ii) a certificate . . . bearing the signature of the defendant Colonel Manuel Alfonso Rodriguez; (iii) a copy of a purchase order for 10,000 submachine guns and 1.5 million rounds of ammunition . . . signed by Howard Peters as purchasing agent on behalf of San Pan Trading Corporation; and (iv) a United States Department of State, Office of Munitions Control, Form DSP-83 . . . signed by the defendant Manuel Alfonso Rodriguez and bearing his official government seal", and (b) "May 5, 1976, the defendants filed, facilitated the filing of, and caused to be filed with the United States Department of State the false and fraudulent documents referred to . . . above"; and that in furtherance of the conspiracy defendants committed 15 described overt acts.

In Counts 2, 3, and 4, appellants and others were charged, in addition to the conspiracy, with substantive crimes in violation of 18 U.S.C. §§ 1001 and 2.



Count 2 alleged that on May 5, 1976 they "in a matter within the jurisdiction of a department or agency of the United States, to wit, the United States Department of State . . . wilfully and knowingly did make, facilitate the making of, and cause to be made certain false, fictitious and fraudulent statements and representations on a United States Department of State Form DSP-5, entitled 'Application/License for Permanent Export of Unclassified Implements of War' . . . that 10,000 'Bushmaster' submachine guns . . . together with . . . ammunition . . . were to be exported to . . . El Salvador . . . whereas . . . defendants . . . knew that the said . . . guns . . . were to be sold to individuals in the United States."

Count 3 is also based on 18 U.S.C. §§ 1001 and 2. The gravamen of the charge is that in a matter within the jurisdiction of the State Department defendants "knowingly did make, facilitate the making of, and cause to be made certain false . . . statements . . . on a certificate dated April 22, 1976 on the official letterhead of the 'Estado Mayor General De La Fuerza Armada, San Salvador, . . . C.A.', bearing the signature of the defendant Manuel Alfonso Rodriguez, that 10,000 'Bushmaster' submachine guns . . . were to be used by the armed forces of El Salvador . . . whereas . . . defendants . . . knew that the . . . guns . . . were to be sold to individuals in the United States . . ."

Count 4 is likewise based on 18 U.S.C. §§ 1001 and 2. Here the charge is that in a matter within the jurisdiction of the State Department, defendants "knowingly did make, facilitate the making of, and cause to be made certain false . . . representations on a purchase order, dated May 3, 1976, from San Pan Trading Corporation . . . to Mott Haven Industries, Ltd. . . . that 10,000 machine guns . . . were to be exported to El Salvador . . . whereas . . . defendants . . . knew that the . . . guns were to be sold to individuals in the United States . . ."

Defendants' contention that the indictment is legally insufficient was not raised in the District Court. Hence it is barred by Rule 12 (b) (2) of the Federal Rules of Criminal Procedure which provides that "objections based on defects in the indictment", except an objection that the indictment "fails to charge an offense", must be raised "prior to trial". *Davis v. United States*, 411 U.S. 233, 243 (1973); *United States v. Campisi*, 306 F. 2d 308, 311-312 (2nd Cir., 1962). Moreover, even if not barred, the contention would lack merit. Contrary to defendants' arguments, each count of the indictment specifies what was false about the cited document or documents submitted to the State Department; inasmuch as each count alleged that the false statement was submitted in a matter within the jurisdiction of a specified federal agency, that is the State Department, it was unnecessary for the indictment further to allege that the false statements were "material and capable of influencing" the State Department, *United States v. Adler*, 380 F.2d 917, 920-22 (2nd Cir., 1967); and even though the word "facilitate" does not appear in the text of either § 1001 or § 1002 of 18 U.S.C. the use in the indictment of that verb in *conjunction* with, and not as an *alternate* to, other verbs directly quoted from the statute was mere harmless surplusage.

Defendants' claims of prosecutorial misconduct are not merely baseless, but reflect on their counsel rather than on the United States District Attorney or his assistants.

The record makes it plain to us that, despite the canards of appellants' counsel, at every stage of the case the Government took the position that it did not claim that defendant Rodriguez had personally signed the certificate referred to in Count 3. Thus the sharpest distinction is drawn in Count 1 between the certificate "*bearing the signature of . . . Rodriguez*" and the Form DSP-83 "Consignee Purchaser Transaction Statement" "*signed by . . . Rodriguez*",



and the purchase order "*signed by* Howard Peters". That distinction was obviously maintained in the text of Count 3 of the indictment as well as in the various oral statements of Government counsel to the District Court and the defense counsel. No reasonable person could doubt that the prosecution's consistent position was that Rodriguez's name on the certificate was there with his full knowledge and authorization, but not as a result of his penmanship. This was the nub of the difference between the certificate "*bearing the signature*" of Rodriguez, and the Form DSP-83 "*signed*" by him.

Appellants' attack upon the Government's closing argument to the jury is so frivolous that we shall not place in the reports what we regard as unwarranted criticism of a wholly unobjectionable and indeed admirably fair summation. We reject the appellants' argument that by indirection the United States District Attorney drew attention to defendants' failure to take the stand. The Fifth Amendment and the statutes and cases which apply its teaching do not preclude a prosecutor from telling a jury that certain factual evidence, even if defendants have not conceded its correctness, is "uncontradicted". *United States v. Rodriguez*, 545 F. 2d 829, 832 (2nd Cir., 1976), *United States v. Arredo-Sarmiento*, 545 F. 2d 785, 793 (2nd Cir., 1976). Indeed, when considering what does constitute proof beyond a reasonable doubt, it is appropriate and perhaps inevitable for a jury or anyone else to examine not merely the solidity of the offered evidence but the fact that nothing in the record places the proffered evidence in doubt. Hence, the prosecutor has a right to show how strong is his case, even if it be true that it appears that a defendant's failure to take the stand or to offer evidence has left him facing a demonstration of Euclidean inevitability.

We have not overlooked, but need not comment extensively upon, other points raised on this appeal.

The United States District Attorney was justified in replying as he did in the District Court to the claim of defendants' trial counsel that the Government had used improper investigative techniques.

There is no merit to defendants' claims that the verdicts against them rest on insufficient, inadmissible, or constitutionally impermissible evidence.

We reject the argument of defendants' appeal attorneys that defendants' trial attorney failed to render his clients effective assistance of counsel. In any complicated case every lawyer, and we might add every judge, is likely to make both procedural and substantive errors, often reflecting mistakes of judgment under pressure. He is also apt to make minor errors of omission. But that is no reason to embrace the specious argument that a defendant has been prejudiced if his counsel fails to raise even meritless points in an effort to preclude a just conviction. Defendant's counsel has obligations to both the court and the client. As an advocate at the bar, he never ceases to be an officer of the court when serving as a lawyer for a litigant. Hence he has a duty not to be frivolous. Our study of this record as a whole satisfies us that defendants were adequately represented in the District Court.

Finally, we regard Judge Duffy's conduct of this case and his charge to the jury as worthy of commendation, not adverse criticism.

Judgments of conviction affirmed.





COPY RECEIVED  
*Robert B. Fiske Jr.*  
MAY 27 1977  
ROBERT B. FISKE JR.  
U.S. ATTORNEY  
SO. DIST. OF N.Y.



